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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policy and Rules Concerning)
the Interstate, Interexchange)
Marketplace)
)
Implementation of Section 254(g))
of the Communications Act of)
1934, as amended)
_____)

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CC Docket No. 96-61

COMMENTS OF SPRINT ON SECTIONS III, VII,
VIII AND IX OF NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

	PAGE
SUMMARY.....	ii
I. REINSTATEMENT OF THE COMMISSION'S PERMISSIVE DETARIFFING POLICY WOULD BE IN THE PUBLIC INTEREST.....	2
A. The Commission's Permissive Detariffing Policies In Effect From The Mid-1980s Until The Early 1990s Were Highly Successful And Should Be Readopted Pursuant To Section 10(a).....	7
B. The Inability Of Nondominant IXC's To Provide Their Communications Services Pursuant To Tariffs Will Force Them To Modify Their Business Operations In Ways That May Be Contrary To The Public Interest.....	10
C. Without Tariffs, Carriers May Be Forced To Impose Special Charges Upon Their Subscribers.....	14
D. Without Tariffs, Carriers May Not Be Able To Rapidly Change Their Terms And Conditions Of Service To Deal With Fraudulent Calling And Schemes Which Seek To Evade Commission Policies.....	16
E. The Curtailment Of Consumer Services And Loss Of Carrier Efficiency That Could Result Under A System Of Mandatory Detariffing Are Not Offset By Any Conceivable Benefits.....	19
II. THE COMMISSION SHOULD AMEND ITS RULES TO ALLOW NONDOMINANT IXCS TO OFFER BUNDLED PACKAGES OF CPE AND INTEREXCHANGE SERVICES.....	26
III. CONCLUSION.....	29

SUMMARY

Sprint recommends that the Commission abandon its proposal to prohibit nondominant carriers from filing or leaving on file tariffs for domestic services. Instead, the Commission should reinstate its permissive detariffing policies which it adopted in *Competitive Carrier* and which contributed to the development of what the Commission has found to be a "market characterized by substantial competition." Permissive detariffing will allow the marketplace to determine whether carriers can more efficiently provide service with tariffs than without them. The marketplace will presumably reward those carriers which correctly decide whether tariffs promote efficiency given the nature of their operations. It is more deregulatory than mandated detariffing.

The Commission's mandatory detariffing proposal is ill-advised. It will have untoward consequences for the provision of long distance services, especially for those customers who rarely use such services or who make casual or collect calls. Such adverse consequences are not offset by any conceivable benefits.

The Commission states that, if the tariffing requirement were removed, the telecommunications market may come to more closely resemble unregulated, competitive markets. But, the telecommunications market may change in ways which the Commission would not regard as beneficial to all consumers. Although large business customers are unlikely to be affected by the change, consumers of widely provided residential and small- to medium-

sized business services may be afforded less convenient access to the IXC's networks and may incur higher charges.

There are clear differences between the provision of long distance services and the provision of service in completely unregulated markets. As part of their common carrier obligations, IXCs provide service upon demand. Thus, customers in these markets do not have to sign a contract, purchase a ticket, present a credit card or even agree to become a customer of a carrier before using the carrier's services. Callers are currently able to utilize the services of any carrier simply by dialing the carrier's 10XXX code, which is especially important in cases where the customer's presubscribed carrier experiences network outages. They also use other carriers in making alternatively billed calls. The ease with which customers can utilize various carriers' services is made possible by the fact that carriers rely upon their tariffs to establish the legal relationship with those who use the carriers' services and thereby ensure payment for the services provided.

Absent tariffs, the ability of customers to conveniently obtain long distance services is likely to change dramatically. If carriers are expected by the Commission to operate in the same manner as unregulated businesses, economic realities may force them to give up the existing practice of providing service upon demand. Without the legal assurance of payment provided by tariffs, carriers may have to insist upon formal contracts with cus-

tomers before providing service. This could delay availability of service to consumers. In addition, carriers may be forced to make 10XXX and alternatively billed calling less convenient -- even in times of natural disasters -- by intercepting all such calls and insisting upon a verifiable credit card or calling card number before completing such calls.

While the costs of obtaining formal agreements with their customers will likely be passed on to such customers in the form of higher rates, other costs incurred in a detariffed environment may have to be recovered by special surcharges, especially on smaller users. Because carriers' tariffs constitute notice of their offerings, carriers do not have to mail customers notices of the myriad of often minor changes they make to such offerings. If carriers are required to detariff their services, they may be required by principles of general commercial law to inform their customers of all changes to their services. The costs of mailing are not insubstantial and would significantly increase the costs to carriers of providing their services. These costs are proportionately higher (as compared to revenues) for low volume users. In a competitive environment, economic necessity may require carriers to seek to recover such costs from the cost-causative customer through a special monthly surcharge. Thus, customers, particularly low volume customers, may have to pay for the "privilege" of receiving what they are likely to regard as "junk mail."

Carriers also use tariffs to enforce the Commission's regulatory policies (such as pay-per-call restrictions), to control fraud, or otherwise to protect the integrity of their networks. Without tariffs, carriers may incur delay and added notice costs in modifying terms and conditions to deal with such situations.

The reasons advanced by the Commission in favor of mandatory detariffing are the same as it advanced nearly a decade ago in the *Sixth Report* and have little or no validity in today's increasingly competitive communications marketplace. Tariffs now take effect on one day's notice. It is by now readily apparent that, the filing of tariffs did not stifle the development of the highly competitive interexchange market; it did not -- and has not -- stifled marketing and service innovations or price discounting as demonstrated by the plethora of price and service options offering substantial savings to consumers that are available today; and it did not -- and does not -- delay the introduction of such innovations into the market. In fact, tariffs filed on one day's notice allow a carrier to change its rates with minimal delay.

Moreover, tariffs have not enabled the IXC's to engage in tacit price collusion. No reliable evidence of such collusion has ever been presented, and it is difficult to accept the notion that tacit price collusion is a problem in an increasingly competitive market. It is also impossible to use tariffs as a

mechanism for collusive pricing when tariff changes become effective on one day's notice.

Similarly, the Commission's concern with the "filed rate doctrine" is unfounded. The filed rate doctrine does not allow carriers to unilaterally break their agreements with term customers. Under Commission precedent, a tariff filing can supersede a contract only if there is "substantial cause." This gives the Commission all the power it needs to protect customers in their enjoyment of the benefits of a fair bargain.

Nor are tariffs a problem because they include provisions which enable carriers to limit their liability for consequential damages due to ordinary negligence. Such provision are reasonable and necessary because common carriers must ordinarily provide service without regard to the content of the customer's message, and without knowledge of either its importance or whether its loss would result in substantial consequential damages. But, any perceived problem here is not caused by tariffs, since the Commission can always order the removal of such provisions from carriers' tariffs.

Finally, Sprint supports the Commission's proposal to eliminate the prohibition on bundling of telecommunications services with CPE.

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**COMMENTS OF SPRINT ON SECTIONS III, VII,
VIII AND IX OF NOTICE OF PROPOSED RULEMAKING**

Sprint Corporation ("Sprint") hereby respectfully submits its comments on the issues set forth in Sections III, VII, VIII and IX of the Commission's *Notice of Proposed Rulemaking* ("Notice"), FCC 96-123, released March 25, 1996 in the above-captioned proceeding.

Specifically, in Section I, Sprint addresses the Commission's proposal to require that nondominant carriers remove all of their tariffs for all of their domestic services and demonstrates that such proposal could have untoward effects on consumers and competition in the domestic interexchange market. Thus, Sprint recommends that the Commission reinstate its permissive detariffing policies adopted in the Commission's *Competitive Carrier* proceeding in CC Docket No. 79-252. In Section II, Sprint discusses why the Commission's proposal to

eliminate the prohibition on bundling of telecommunications services with customer premises equipment ("CPE") should be adopted.

I. REINSTATEMENT OF THE COMMISSION'S PERMISSIVE DETARIFFING POLICY WOULD BE IN THE PUBLIC INTEREST.

Under new Section 10(a) added by the Telecommunications Act of 1996, the Commission may "forbear from applying" a provision of the Communications Act to telecommunications carriers if it determines (1) that enforcement of the provision is not necessary to ensure the carriers' compliance with Sections 201(b) and 202(a) of the Act, 47 USC §§201(b) and 202(a); (2) that the enforcement of the provision "is not necessary for the protection of consumers"; and (3) that forbearance "is consistent with the public interest." In its Notice, the Commission tentatively concludes that enforcement of the tariff filing requirements of Section 203 with respect to the domestic interexchange services of nondominant IXC's is no longer necessary in light of these criteria and it is thus "required by the 1996 Act to forbear from applying such requirements." Notice at ¶19.

However, the Notice goes further. The Commission tentatively concludes that it should not only forbear from enforcing the requirements of Section 203, but that it also should prohibit nondominant carriers from filing or leaving on

file tariffs for domestic service. The Commission's authority to mandate such a result is unclear.¹ What is clear, even assuming, *arguendo*, that the Commission has such authority, is that its proposal for mandatory detariffing is ill-advised as a matter of policy.

As explained further, mandatory detariffing is likely to have adverse consequences for the provision of long distance service, particularly for those customers who use such service to

¹ Section 10(a) of the Act speaks, *inter alia*, of the power of the power of the Commission to "forbear" from enforcement of Section 203. The terms forbear and forbearance are not defined in the 1996 Act. According to Webster's Ninth New Collegiate Dictionary (1983), to forbear is to "abstain" or "hold back" and forbearance means "a refraining from the enforcement of something (as a debt, right, or obligation) that is due." These definitions would not appear to support the view that Congress intended to bestow upon the Commission the power to nullify Section 203 so that it would exempt certain carriers or certain services. Usually, when Congress grants a regulatory agency exemption authority, it does so explicitly. *Compare*, Section 332(c)(1)(A) of the Communications Act, 47 U.S.C. §332(c)(1)(A), giving the Commission the authority, with certain limitations, to "specify by regulation as inapplicable" to providers of commercial mobile services certain provisions of Title II of the Act; *compare also*, the Airline Deregulation Act of October 24, 1978, 92 Stat. 1705, 1731-32, which amended the then-existing Section 416(b) of the Federal Aviation Act, 49 USC §416(b), so as to give the Civil Aeronautics Board the power "to exempt from the requirements of this title [relating to economic regulation] or any provision thereof ... any person or class of persons if it finds that such exemption is consistent with the public interest."

make relatively few calls, or to make "casual calls" or "collect calls." As a matter of commercial necessity, a carrier may have to provide notice of all changes in the rates, terms and conditions of any service it offers, including those changes which might well be thought of as trivial. Similarly, as a matter of commercial necessity, a carrier may have to require each customer to agree to enter into a service contract which includes the rates, terms and conditions at which the service is being provided before the carrier even undertakes to provide such service. Without notice or formal contractual arrangements -- which are typical of most business relationships -- there is no way that a carrier can assure that the user of its service will pay for such service or take such service pursuant to appropriate terms and conditions. In particular, if a carrier cannot limit its liability for consequential damages as a result of the carrier's ordinary negligence, it will have to insure, or at least self-insure, against the possibility of such consequential damages, and collect the cost of such insurance from its customers. All of these changes will make it difficult for carriers to continue to serve low-volume, intermittent, casual or collect callers on a "pay-as-you-go" basis. Under these circumstances, given the requirements of contracts and notice and

the possibility of enormous consequential damages, it would seem to make economic sense for a carrier to at least charge a base fee to all customers for the right to use its network.

Assuming that the Commission does not want such an economic result, there are no other "benefits" which would impel the Commission to mandate that nondominant carriers remove their domestic tariffs. Mandatory detariffing would not give carriers additional flexibility or enable them to compete more intensely. Whatever the theoretical possibility of "collusion," the enormous growth of competition -- despite the fact that tariffs were in effect on a voluntary basis since 1983 -- would suggest that collusion has not been a problem. Even if collusion were, hypothetically, a problem, detariffing still would not resolve this problem. The existing rates of long distance carriers for widely provided services are easily ascertainable.²

Similarly, the Commission's concern with the "filed rate doctrine" would appear unfounded. The filed rate doctrine does not allow carriers to unilaterally break their agreements with

² As explained below, permissive detariffing is important only for such widely provided services. Sprint has no objection to mandatory detariffing for contract tariffs whose terms are not easily ascertainable -- in most cases -- even after the contract tariff is filed.

term customers. As the Commission made clear in *RCA Americom*,³ a tariff filing can supersede a contract only if there is "substantial cause." This gives the Commission all the power it needs to protect customers in their enjoyment of the benefits of a fair bargain.

Nor are tariffs a problem because they may provide a vehicle for carriers to enforce provisions which limit their liability for consequential damages due to ordinary negligence. Common carriers must ordinarily provide service without regard to the content of the customer's message, and without knowledge of either its importance or whether its loss would result in substantial consequential damages. Under these circumstances, Sprint submits that it is not unreasonable for common carriers to seek to limit their liability for consequential damages. But, in any case, any problem here is not caused by tariffs. If the Commission wants such provisions removed because it regards them as unreasonable, it can order their removal.

Permissive detariffing will allow the marketplace to determine whether carriers can more efficiently provide service with tariffs than without them. If a carrier believes that

³ *RCA American Communications Inc.*, 84 FCC 2d 353 (1980); 86 FCC 2d 1197 (1981); 2 FCC Rcd 236 (1987).

tariffs are burdensome, that they cause unnecessary delay or expense, or that they eliminate flexibility and the element of surprise in changing prices, the carrier can elect not to file. Conversely, if a carrier believes that tariffs are helpful in providing service on demand, in meeting its common carrier obligations, and in reducing delay and expense, it can elect to file. As noted above, and discussed further herein, the tariffing concerns raised by the Commission are entirely groundless. There is no reason not to let the carriers themselves decide. The marketplace will presumably reward those carriers which correctly decide whether tariff filings promote efficiency given the nature of their operations. In a very real sense, such a solution is more deregulatory than mandated detariffing.

A. The Commission's Permissive Detariffing Policies In Effect From The Mid-1980s Until The Early 1990s Were Highly Successful And Should Be Readopted Pursuant To Section 10(a).

The Commission's only experience with affording nondominant carriers the ability to provide services on a detariffed basis was gained as a result of its permissive detariffing policies

adopted in *Competitive Carrier*.⁴ Although some nondominant carriers, especially the smaller resellers with a limited base of customers, availed themselves of the Commission's permissive detariffing policies to operate without tariffs, most of the larger nondominant carriers, including Sprint and MCI, continued to file tariffs for most of their services. Where such carriers exercised their freedom to provide services on an off-tariff basis, it was in the provision of services to large business customers.

In terms of the results achieved, there is every reason to believe that the Commission's permissive detariffing policies worked well. Indeed, as the Commission has found, the regulatory policies which it adopted in *Competitive Carrier*, including, presumably, its permissive detariffing policies, helped produce the substantially competitive domestic interexchange market of today.⁵

⁴ The *Second Report and Order in Competitive Carrier*, 91 FCC 2d 59 (1982), applied permissive detariffing to resellers; permissive detariffing was extended to the rest of the nondominant interexchange carrier ("IXC") industry by *Competitive Carrier's Fourth Report and Order*, 95 FCC 2d 554 (1983) and *Fifth Report and Order*, 98 FCC 2d 1191 (1984).

⁵ The Commission makes clear that during the period in which its permissive detariffing policies were effective, the "interstate, domestic interexchange market has evolved from a market of

Under permissive detariffing, nondominant carriers had the flexibility to provide services to the various segments of the market in the most efficacious manner possible. They were able to provide their large business customers with communications services specifically tailored to such customers' often unique needs pursuant to contracts, which were then simply adopted in separate tariff filings or not tariffed at all. But, even for larger customers whose agreements were not tariffed, it was frequently convenient to simply incorporate into the contracts terms and conditions contained in filed tariffs.

Notwithstanding their option to detariff, nondominant carriers continued to provide service to residential and small- to medium-sized business customers on a tariffed basis. They did so, in part, because tariffs are important in enabling carriers to provide service without first entering into formal contractual arrangements. See Section I.B. They also did so, in part, because tariffs provide notice of changes in rates, terms and conditions, so that nondominant carriers are able to avoid any commercial necessity of providing such notice to customers

fledgling competitors overshadowed by a single dominant service provider to a market characterized by substantial competition." Notice at ¶2.

individually by mail and thereby avoid both cost and delay. See Section I.C.

Moreover, carriers could rely on tariffs to enforce terms and conditions thought reasonable or commercially necessary, or imposed by the Commission. For example, carriers have used tariffs to enforce Commission regulatory policies such as pay-per-call restrictions, rules governing operator services from payphones, and restrictions on the use and sale of telephone subscriber information. Carriers will also be able to use tariffs to enforce the new Commission policies concerning nationwide geographic rate averaging and rate integration which may be adopted in this proceeding. The success of the Commission's permissive detariffing policies adopted in *Competitive Carrier* strongly suggests that such policies should be reinstated here under the Commission's newly gained forbearance authority.

B. The Inability Of Nondominant IXC's To Provide Their Communications Services Pursuant To Tariffs Will Force Them To Modify Their Business Operations In Ways That May Be Contrary To The Public Interest.

It may be true, as the Commission states, that if the tariffing requirement were removed, the telecommunications market may come to more closely resemble unregulated, competitive markets. See Notice at ¶34. Plainly, if nondominant carriers

are unable to rely upon their tariffs to define the business relationship with those who use their services, they will need to change the way they offer and provide their services. But, it is not clear that the requirement for mandatory detariffing will change the market in ways which the Commission would regard as beneficial to all consumers. Although large business customers are unlikely to be affected by the change, consumers of widely provided residential and small- to medium-sized business services may incur higher charges, including a flat charge, simply to access the networks of long distance carriers.

There are clear differences between the provision of long distance services and the provision of service in completely unregulated markets. As part of their common carrier obligations, IXCs provide service upon demand. Thus, customers in these markets do not have to sign a contract, purchase a ticket, or present a credit card before they utilize a particular carrier's services.⁶ In fact, they do not even have to agree to become a customer of a carrier before using the carrier's services. Callers are currently able to utilize the services of

⁶ Carriers do attempt to obtain letters of agency from their customers. However, as the Commission is aware, such attempts are not always successful.

any carrier simply by dialing the carrier's 10XXX code. The ability to reach the network of another carrier by such dialing method is especially important in cases where the customer's presubscribed carrier experiences network outages due to natural disasters, cable cuts or other problems.

Moreover, alternatively billed calls (e.g., collect calls) often are provided by a carrier other than the presubscribed carrier of the person paying for the call. A Sprint customer, for instance, may receive a call from an AT&T operator asking if he or she would accept a collect call from someone dialing from a phone presubscribed to AT&T. If the Sprint customer agrees to accept the call, he or she will be billed by AT&T at AT&T's rates.

The ease with which customers can utilize various carriers' services has undoubtedly contributed to the development of a substantially competitive interstate, domestic, interexchange market. And, this ease is, in turn, made possible by the fact that carriers are able to rely upon their tariffs to establish the legal relationship with those who use the carriers' services. Thus, carriers are able to ensure that they are paid for providing services without a formal contract with callers or

without the necessity of gaining some guarantee of payment, e.g., a credit card, before transporting the call.

Absent tariffs, the ability of customers to conveniently obtain long distance services is likely to change dramatically. If carriers are expected by the Commission to operate in the same manner as unregulated businesses, economic realities may force them to give up the existing pattern of providing service upon demand. Thus, without the legal assurance of payment provided by tariffs, carriers may have no choice but to insist upon formal contracts with customers before providing service. This could delay availability of service to consumers when they move to a new location, or seek to change their service providers. In addition, carriers may be forced to make 10XXX calling less convenient -- even the 10XXX calls made in times of natural disasters -- by intercepting all such calls and insisting upon a verifiable credit card or calling card number before connecting such calls to their networks. Similarly, a carrier may insist that a person agreeing to receive a collect call guarantee payment by giving his credit card or calling card number. If the person does not have a credit card or simply refuses to give his or her credit card number to the carrier's operator -- and credit card companies advise their customers not to give out their

credit card numbers over the phone unless they are the ones making the phone call -- the carrier may not be willing to connect the call.

**C. Without Tariffs, Carriers May Be Forced To
Impose Special Charges Upon Their Subscribers.**

The fact that carriers may be required to obtain formal contracts with all of their customers or institute procedures for securing a guarantee of payment before providing service will undoubtedly increase their costs of providing service. Such increased costs will likely be passed on to customers generally in the form of higher rates and charges. But some costs that will undoubtedly be incurred if carriers are required to provide service on an detariffed basis may have to be recovered in the form of special surcharges, especially on customers who seldom make long distance calls.

Because a carrier's tariffs constitute notice of the rates, terms and conditions of the services provided by the carrier, they provide an efficient and cost effective way of informing the carrier's customers of any changes to such rates, terms and conditions. Carriers do not have to mail customers notices of the myriad of often minor changes they make to their services (e.g., changing a technical parameter of service, modifying a V&H coordinate, or clarifying a tariff provision), and customers do

not have to deal with what they are likely to regard as simply another piece of "junk mail."

If carriers are required to detariff their services, they may be required by principles of general commercial law to inform their customers of all changes to their services. The costs of mailing are not insubstantial. A separate mailer costs Sprint about \$3.50 per customer for a single page and \$.10 per customer for each additional page. A "bill stuffer" adds from \$.05 to \$.14 to the cost of each Sprint bill. Obviously the less frequently a customer uses a long distance carrier, the greater the relative importance these costs assume.

Such notice requirements would significantly increase the costs to carriers of providing their services, which would have to be recovered from their customers. These costs are proportionately higher (as compared to revenues) for low volume users. In a competitive environment, economic necessity may require carriers to seek to recover such costs directly from the cost-causative customers who make few, if any, long distance calls. A significant portion of an IXC's subscriber base consists of such customers that were either allocated to the IXC under the Commission's balloting and allocation procedures or simply selected the IXC without any intention of using the

carrier's services because they were asked to choose an IXC by the local exchange carrier when they obtained local phone service.

For such customers, and for smaller customers generally, carriers may seek to recover the costs of providing notices of changes in their services through a special monthly surcharge. Thus, not only would customers receive unwanted junk mail, but they would also be required to pay for the "privilege."

D. Without Tariffs, Carriers May Not Be Able To Rapidly Change Their Terms And Conditions Of Service To Deal With Fraudulent Calling And Schemes Which Seek To Evade Commission Policies.

Because carriers are able to rely upon their tariffs to provide effective notice of changes in the rates, terms and conditions of service, they are able to rapidly introduce measures by which they can enforce Commission policies, control fraud, or otherwise protect the integrity of their networks. For example, after the Commission first prescribed regulations governing the provision of pay-per-call services provided over 900 numbers, some information providers (IPs), including those offering so-called "dial-a-porn" services, switched to 800 service in order to continue to provide their services without

having to comply with such rules.⁷ Customers dialing these 800 numbers would incur charges as if they had placed a 900 call. The use of 800 numbers to provide pay-per-call services was subsequently banned by the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA") and Commission regulations issued thereunder, see 47 CFR §64.1504.⁸ In the interim, however, and once it became aware of the problem, Sprint was able to move quickly to ensure that IPs did not evade the Commission's newly prescribed rules regarding pay-per-call services and to protect the integrity of its 800 service product by inserting language in its 800 service tariffs under which it was able to terminate the use of its 800 services by IPs for pay-per-call services.

Without the ability to change conditions of service through tariffs, Sprint would not have had a simple, prompt and efficient way to stem the growing number of complaints it received from

⁷ The Commission's rules governing the provision of 900 services were adopted in *Policies and Rules Concerning Interstate 900 Telecommunications Services*, 6 FCC Rcd 6166 (released October 23, 1991).

⁸ TDDRA became law on October 28, 1992 (Pub. Law 102-556, 106 Stat. 4181) and the Commission's implementing regulations were adopted August 13, 1993 in *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, 8 FCC Rcd 6865.

customers who were charged for 800 calls.⁹ Instead, it presumably would have had to engage in the costly process of re-negotiating with its IP customers modifications to their existing arrangements. And, pending the completion of such negotiations, the IPs would have been able to continue to evade the Commission's rules for pay-per-call services by using 800 numbers.

Moreover, IXC's must be vigilant in guarding against the fraudulent use of their networks. Those bent on "beating the system" are constantly seeking to devise new schemes to circumvent the carriers' fraud control measures. Once a carrier discovers a new fraud scheme, it will seek to develop counter-measures. If these measures involve a change in the terms and conditions of the carrier's services, e.g., blocking calls from a particular area code, the carrier is able to quickly implement them by filing revisions to its tariffs. Under the Commission's mandatory detariffing proposal, it may be several weeks before the carrier is able to implement such fraud control measures since it may have to print up and mail notices to each of its

⁹ Sprint had also been contacted by several state attorneys general expressing concern about the use of 800 numbers for pay-per-call services.